IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25..04..2007

CORAM

THE HON'BLE MR.A.P.SHAH, CHIEF JUSTICE
and
THE HON'BLE MRS. JUSTICE CHITRA VENKATARAMAN

W.A.Nos.443 to 445 of 2007

M/s. Tamil Nadu Magnesite Limited,
5/53, Omalur Main Road,
Jagir Ammapalayam,
Salem - 636 302. ..Appellant in all the Writ Appeals.

Vs.

1. The State of Tamil Nadu,
rep. by its Secretary,
Commercial Taxes Department,
Fort St. George,
Chennai - 600 009.

2. The Commercial Tax Officer,
Suramangalam Assessment Circle, Salem.

..Respondents in all the Writ Appeals.

Appeals filed under Clause 15 of the Letters Patent, against the order dated 12.02.2007 made in W.P.Nos.2580, 2631 and 2359 of 2006 (O.P.Nos. 46, 47 & 248 of 2004)

WP No.2359/2006: (OP No. 248/2004) OP filed before the Tamil Nadu Taxation Special Tribunal seeking for the relief of calling for the records of the second respondent in TNGST No.2800193/1999-2000 and set aside the impugned proceedings dated 31.7.2003 as the same has been passed without considering the objections and documents filed by the petitioner without granting personal hearing as contemplated under the provisions of the TNGST Act and also against the principles of natural justice.

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WP Nos.2580 and 2631/06 (OP Nos. 46 and 47/2004) filed before the Tamil Nadu Taxation Special Tribunal seeking for the relief of calling for the records of the second respondent in TNGST No.2800193/1999-2000 and set aside the impugned proceedings dated 31.3.2003 as the same has been passed against the provisions of the TNGST Act and also unconstitutional as being beyond the State's taxing power under Entry 54 in List II in the Seventh Schedule to the constitution of India in so far as the levy of the tax under Section 7A and 3(4) of the TNGST Act.

For Appellant :: Mr.P.Rajkumar

For Respondents :: Mr.Haja Nazirudeen,
Spl. G.P. (Taxes)

J U D G M E N T

(Judgment of the Court was delivered by The Hon'ble The Chief Justice)

The issue involved in all these appeals is one and the same, and the parties are also one and the same. The argument advanced by the respective parties is also the same. By consent of the parties, all the appeals are taken up for disposal.

2. The facts leading to these appeals are as follows:

The appellant, a Government of Tamil Nadu undertaking is a registered dealer both under the Tamil Nadu General Sales Tax Act (for short, the "TNGST Act") and Central Sales Tax Act (for short, the "CST Act"). The appellant was originally granted temporary working permission for a period of nine months from 26.09.1997 to 25.06.1998 for mining magnesite and dunite over an extent of 177.96 hectares of forest land in Salem Division subject to certain conditions by G.O.(2D) No.53, Environment and Forest (FRX) Department dated 23.10.1997. Subsequently, by Government Order in G.O.Ms.No.234, Environment and Forest Department dated 06.08.1998, the Government of Tamil Nadu renewed the lease in favour of the appellant for the said area of 177.96 hectares (168.78 hectares of already broken up area and 9.882 hectares of to be broken up area) for a period of ten years from the date of issue of the said order on conditions mentioned therein. Pursuant to the grant of lease, the appellant entered into a mining lease in Reserve Forest

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Agreement under Forest (Conservation) Act, 1980 with the District Forest Officer, Salem on 24.11.2002 agreeing to all the conditions contained therein and the conditions in respect of payment of rent and royalty reserved therein.

3. For the assessment year 1999-2000, the appellant filed the monthly return in Form A1 under the TNGST Act reporting their total and taxable turnover of Rs.2,61,85,450.48 paise and Rs.2,58,28,274.32 paise claiming exemption over a turnover of Rs.3,57,176.16 paise. The appellant's books of accounts were called for and checked for framing of the assessment by the second respondent-assessing officer. Upon checking of the returns filed by the appellant with reference to the books of accounts, the second respondent issued pre-assessment notice on 16.12.2002 pointing out certain defects and omissions in the returns filed by the appellant vis-à-vis their accounts. It is not necessary to refer all the defects stated in the pre-assessment notice, as the only issue pressed by the learned counsel for the appellant is in respect of the view taken by the second respondent in paragraph 3 of the notice. In paragraph 3, the second respondent has stated that the appellant has excavated 'raw magnesite' from the lands owned by the Government of Tamil Nadu for a price consideration and consumed them in the manufacture of other goods for sale. According to the second respondent such purchase consideration is assessable to tax at 11 percent under Section 7-A of the TNGST Act. It appears that the quantity quarried during the assessment year 1999-2000 has been arrived at 78,000 metric tons and the value of the same was arrived at Rs.8,10,20,845/-, which quantity and value are stated by the appellant in Schedule 25(15) of the annual report of the appellant company.

4. The appellant filed their objections to the pre-assessment notice. In respect of the proposal of levying tax under Section 7-A of the TNGST Act, the main objection of the appellant was that inasmuch as the taxable goods viz., 'raw magnesite' was quarried from the appellant's leasehold land and consumed in the appellant's factory, the taxable goods were appellant's own goods and there was no element of purchase and in that view of the matter, the respondents cannot invoke Section 7-A of the TNGST Act. It was further explained that the quantity and value shown in the annual report was the quantity and value of the mineral excavated from the leasehold land and the purchase value of the mineral purchased from M/s.India Magnesite Product Limited. The disclosure of such particulars in the annual report was for the purpose of complying with the provisions of the Companies Act, 1956. The second respondent by his proceedings dated 31.03.2003 confirmed the proposal in respect of purchase tax under Section 7-A for the assessment years 1999-2000 and 2000-2001 by overruling the objections raised. The appellant challenged the above order of the second

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respondent in O.P.Nos.46, 47 and 248 of 2004 before the Tamil Nadu Taxation Special Tribunal. Subsequently, the O.Ps., were transferred to this Court and re-numbered as W.P.Nos.2539, 2580 and 2631 of 2006. The value of the mineral which has been recorded as purchase consideration and assessed to tax under Section 7-A of the TNGST Act is put in issue in W.P.Nos.2580 and 2631 of 2006. The learned single Judge was pleased to dismiss the writ petitions holding that the assessee has an alternative remedy by way of appeal to the prescribed authority under Section 31 of the TNGST Act.

5. Mr.P.Rajkumar, learned counsel appearing for the appellant strenuously submitted that the levy of purchase tax under Section 7-A of the TNGST Act on the 'magnesite' excavated from the leasehold land is without jurisdiction and also unconstitutional as beyond the State's taxing power under Entry 54 in List II of the VII Schedule to the Constitution of India. Learned counsel urged that under the mining lease, the appellant is entitled to take the benefit arising out of the forest land and the same is a profit a prendre, which in Indian Law is a benefit arising out of the land creating interest in immovable property. Hence, the attempt on the part of the respondents to tax the value of 'raw magnesite' excavated from the leasehold land is ultra vires the TNGST Act. He submitted that the basic ingredient of Section 7-A i.e., transaction of sale or purchase is absent in the appellant's case and so the levy of purchase tax under Section 7-A is against the provisions of the TNGST Act. He also referred to the clarification issued by the Special Commissioner of Commercial Taxes, Chennai vide Circular Lr.No.Acts Cell-I/57064/99 dated 30.03.2000 addressed to all the Deputy Commissioners of Commercial Taxes Department stating that there can be no levy of tax on royalty received on leasing of mines from 04.04.1991 and consequently, the question of levy of purchase tax under Section 7-A on the royalty paid does not arise. In order to sustain his argument, learned counsel relied on the decisions of the Supreme Court in Ananda Behra Vs. State of Orissa, (1955) 2 SCR 919, State of Orissa Vs. Titaghur Paper Mills Co. Ltd., (1985) 60 STC 213, and State of H.P. Vs. Gujarat Ambuja Cement Ltd., (2005) 142 STC 1. On the other hand, learned Special Government Pleader appearing for the Revenue submitted that the agreement of lease is in effect an agreement of sale of future goods, namely., minerals to be extracted from the leasehold lands. He urged that the minerals came into existence after the execution of the lease and that they were future goods, once they came into existence, the property in them passed on to the appellant company and thus, the provisions of Section 7-A of the Act are clearly attracted in the facts and circumstances of the case.

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6. Section 7-A of the TNGST Act reads as follows:-

> "7-A. Levy of purchase of tax. – (1) subject to the provisions of sub-section (1) of Section 3, every dealer who in the course of his business purchases from a registered dealer or from any other person, any goods (the sale or purchase or which is liable to tax under this Act) in circumstances in which no tax is payable under Section 3 or 4, as the case may be, (not being a circumstance in which goods liable to tax under sub-section (2), (2-A) or (2-C) of Section 3 or Section 4, were purchased at a point other than the taxable point specified in the First, the Fifth, the Eleventh or the Section Schedule respectively and either, --
>
> (a) consumes or uses such goods in or for the manufacture of other goods for sale or otherwise; or
>
> (b) disposes of such goods in any manner other than by way of sale in the State; or
>
> (c) despatches or carries them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce; or
>
> (d) installs and uses such goods in the factory for the manufacture of any goods,
>
> shall pay tax on the turnover relating to the purchase as aforesaid at the rate mentioned in Section 3 or 4, as the case may be.
>
> (2) Notwithstanding anything contained in sub-section (1), the provisions of Section 7 shall apply to a dealer referred to in sub-section (1) who purchases goods (the sale of which is liable to tax under sub-section (1) of Section 3) and whose total turnover for a year is not less than one lakh of rupees but not more than two lakhs of rupees, and such a dealer may, at his option, instead of paying the tax in accordance with the provisions of sub-section (1) pay tax at the rates mentioned in sub-section (1) of Section 7:

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Provided that this sub-section shall not apply to the purchases made on or after the 1st day of April, 1990.

(3) Every dealer liable to pay purchase tax under sub-section (1), shall, for the purpose of this Act, be deemed to be a registered dealer."

7. In State of Tamil Nadu Vs. M.K.Kandaswami and others, (1975) 36 STC 191, the Supreme Court has held that Section 7-A (1) of the TNGST Act could be invoked if the following ingredients mentioned in the Section are cumulatively satisfied:

(1) The person who purchases the goods is a dealer;
(2) The purchase is made by him in the course of his business;
(3) Such purchase is either from a registered dealer or from any other person;
(4) The goods purchased are 'goods', the sale or purchase of which is liable to tax under this Act;
(5) Such purchase is in circumstances in which no tax is payable under Sections 3, 4 or 5, as the case may be, and
(6) The dealer either –
  (a) consumes such goods in the manufacture of other goods for sale or otherwise, or
  (b) despatches all such goods in any manner other than by way of sale in the State, or
  (c) despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-state trade or commerce.

8. The question that falls for our consideration is whether the ingredients of Section 7-A of the TNGST Act are satisfied and whether there was a transaction of sale or purchase of goods which is liable to tax under the Act. According to the learned counsel for the appellant the second respondent has no jurisdiction to levy purchase tax under Section 7 – A of the TNGST Act as the quarrying of raw magnesite is nothing but a profit a prendre, which is a benefit arising out of immovable property and beyond the taxing power of the State. The meaning and nature of a profit a prendre have

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been thus described in Halsbury's Laws of England, IV Edition, Volume 14, paragraphs 240 to 242 at pages 115 to 117:

> "240. Meaning of 'profit a prendre'.
>
> A profit a prendre is a right to take something off another person's land. It may be more fully defined as a right to enter another's land and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right. The term 'profit a prendre' is used in contradistinction to the term 'profit a prendre', which signified a benefit which had to be rendered by the possessor of land after it had come into his possession. A profit a prendre is servitude.
>
> 241. Profit a prendre as an interest in land.
>
> A profit a prendre is an interest in land, and for this reason any disposition it must be in writing. A profit a prendre which gives a right to participate in a portion only of some specified produce of the land is just as must an interest in the land as a right to take the whole of that produce…….
>
> 242. What may be taken as a profit a prendre.
>
> The subject matter of a profit a prendre, namely, the substance which the owner of the right is by virtue of the right entitled to take, may consist of animals, including fish and fowl, which are on the land, or of vegetable matter growing or deposited on the land by some agency other than that of man, or of any part of the soil itself, including mineral accretions to the soil by natural forces. The right may extend to the taking of the whole of such animal or vegetable matters or merely a part of them. Rights have been established as profits a prendre to take acorns and beech mast, brakes, fern, heather and litter, thorns, turf and peat, boughs and branches of growing trees, rushes, freshwater fish, stone, sand and shingle from the seashore and ice from a canal; also the right of pasture and of shooting pheasants. There is, however, no right to take seacoal from the foreshore. The right to take animals ferae naturae while they are upon the soil belongs to the owner of the soil, who may grant to others as a profit a prendre a right to come and take them by a grant of hunting, shooting, fowling and so forth."

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9. Clause (26) of Section 3 of the General Clauses Act, 1897 defines 'immovable property' as including inter alia 'benefit to arise out of land'. The definition of 'immovable property' in Clause (f) of Section 2 of the Registration Act, 1908 illustrates a benefit to arise out of land by stating that immovable property 'includes……..rights to ways, lights, ferries, fisheries, or any other benefit to arise out of land'. The Transfer of Property Act, 1882 does not give any definition of 'immovable property' except negatively by stating that immovable property does not include standing timber, growing crops, or grass. However, by Section 4 of the General Clauses Act, the definitions of certain words and expressions, including 'immovable property' and 'movable property', given in Section 3 of that Act are directed to apply also, unless there is anything repugnant in the subject or context, to all Central Acts and the definitions of these two terms apply when they occur in the Transfer of Property Act.

10. In Ananda Behera Vs. State of Orissa, cited supra, the Supreme Court held that a profit a prendre is a benefit arising out of land and that in view of Clause (26) of Section 3 of the General Clauses Act, it is immovable property within the meaning of the Transfer of Property Act. The petitioners in that case had obtained oral licences for catching and appropriating fish from specified sections of the Chilka Lake from its proprietor, the Raja of Parikud, on payment of large sums of money prior to the enactment of the Orissa Estates Abolition Act, 1951. Under the said Act, the estates of the Raja of Parikud vested in the State of Orissa and the State refused to recognize the rights of the petitioners and was seeking to re-auction the rights of fishery in the said lake. The petitioners, contending that the State had infringed or was about to infringe their fundamental rights under Articles 19(1)(f) and 31(1) of the Constitution of India, filed petitions in the Supreme Court under Article 32 of the Constitution of India. In their petition, the petitioners claimed that the transactions entered into by them were sales of future goods, namely, fish in the sections of the lake covered by the licences and that as fish was movable property, the said Act was not attracted because it was confined to immovable property. The Court observed that if this contention of the petitioners was correct, then their petition under Article 32 was misconceived because until any fish was actually caught, the petitioners would not acquire any property in it. The Court held that what was sold to the petitioners was the right to catch and carry away fish in specific sections of the lake for a specified future period and that this amounted to a licence to enter on the land coupled with a grant to catch and carry away the fist which right was a profit a prendre and in England it would be regarded as an interest in land because it was a right to take some profit of the soil for the use of the

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owner of the right and in India it would be regarded as a benefit arising out of the land and as such would be immovable property. The Court then pointed out that fish did not come under the category of property excluded from the definition of 'immovable property'. The Court further held that if a profit a prendre is regarded as tangible immovable property, then the 'property' being over Rs.100 in value, the document creating such right would require to be registered, and if it was intangible immovable property, then a registered instrument would be necessary whatever the value, but as in the case before the Court the sales were all oral and therefore, there being neither writing nor registration, the transactions passed no title or interest and accordingly the petitioners had no fundamental rights which they could enforce.

11. In State of Orissa Vs. Titaghur Paper Mills Co. Ltd., cited supra, the principal contention was that the subject matter of the bamboo contract was not a sale or purchase of goods but was a lease of immovable property or in any event was the creation of an interest in immovable property by way of grant of profit a prendre which according to the respondent-company amounted in Indian law to an easement under the Indian Easements Act, 1882 and that for the said reason the amounts or royalty payable under the bamboo contract could not be made exigible to either sales tax or purchase tax in the exercise of the legislative competence of the State, and therefore, the impugned provisions were unconstitutional and ultra vires the Orissa Sales Tax Act, 1947. The Supreme Court dismissing the appeals preferred by the State held that the bamboo contract was not a contract for the sale of goods. It was further held that the bamboo contract was not a lease or the grant of an easement; it conferred upon the company a benefit to arise out of land, namely, the right to cut and remove bamboos which would grow from the soil coupled with ancillary rights and was thus a grant of a profit a prendre. Therefore, any attempt on the part of the State Government to tax the amounts payable under the bamboo contracts would not only be ultra vires the Orissa Act but also unconstitutional as being beyond the taxing power of the State Legislature under entry 54 of List II of the VII Schedule to the Constitution of India. The relevant observations of the Court are reproduced below:

> "102. Royalty is not a term used in legal parlance for the price of goods sold. 'Royalty' is defined in Jowitt's Dictionary of English Law, Fifth Edition, Vol.2, page 1595, as follows:
>
> Royalty, a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of the right by the grantee. It is usually a payment of money,

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but may be a payment in kind, that is, of part of the produce of the exercise of the right.

Royalty also means a payment which is made to an author or composer by a publisher in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent.

We are not concerned with the second meaning of the word 'royalty' given in Jowitt. Unlike the Timber contracts, the bamboo contract is not an agreement to sell bamboos standing in the contract areas with an accessory licence to enter upon such areas for the purpose of felling and removing the bamboos nor is it, unlike the timber contracts, in respect of a particular felling season only. It is an agreement for a long period extending to fourteen years, thirteen years and eleven years with respect to different contract areas with an option to the respondent-company to renew the contract for a further term of twelve years and it embraces not only bamboos which are in existence at the date of the contract but also bamboos which are to grow and come into existence thereafter. The payment of royalty under the bamboo contract has no relation to the actual quantity of bamboos cut and removed. Further, the respondent-company is bound to pay a minimum royalty and the amount of royalty to be paid by it is always to be in excess of the royalty due on the bamboos cut in the contract areas.

103. We may pause here to note what the Judicial Committee of the Privy Council had to say in the case of Raja Bahadur Kamakshya Narain Singh of Ramgarh Vs. Commissioner of Income-tax, Bihar and Orissa, (1943) 11 ITR 513 (PC) about the payment of minimum royalty under a coal mining lease. The question in that case was whether the annual amounts payable by way of minimum royalty to the lessor were in his hands capital receipt or revenue receipt. The Judicial Committee held that it was an income flowing from the covenant in the lease. While discussing this question, the Judicial Committee said (at page 522-3):

> 'These are periodical payments, to be made by the lessee under his covenants in consideration of the benefits which he is granted by the lessor. What these benefits may be is shown by the extract from the lease quoted above, which illustrates how inadequate and fallacious it is to envisage the royalties as merely the price of the actual tons of coal. The tonnage royalty is indeed only payable when

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the coal or coke is gotten and dispatched: but that is merely the last stage. As preliminary and ancillary to that culminating act, liberties are granted to enter on the land and search, to dig and sink pits, to erect engines and machinery, coke ovens, furnaces and form railways and roads. All thee and the like liberties show how fallacious it is to treat the lease as merely one for the acquisition of a certain number of tons of coal, or the agreed item of royalty as merely the price of each ton of coal.'

Though the case before the Judicial Committee was of a lease of a coal mine and we have before us the case of a grant for the purpose of felling, cutting and removing bamboos with various other rights and licences ancillary thereto, the above observations of the Judicial Committee are very pertinent and apposite to what we have to decide.

……

120. It is true that the nomenclature and description given to a contract is not determinative of the real nature of the document or of the transaction thereunder. These, however, have to be determined from all the terms and clauses of the document and all the rights and results flowing therefrom and not by picking and choosing certain clauses and the ultimate effect or result as the court did in the Orient Paper Mills' case [See (1977) 40 STC 603 (SC)].

…….

127. Conclusions – To summarise our conclusions:

……..

(9)The dictionary meaning of a word cannot be looked at where that word has been statutorily defined or judicially interpreted but where there is no such definition or interpretation, the court may take the aid of dictionaries to ascertain the meaning of a word in common parlance, bearing in mind that a word is used in different senses according to its context and a dictionary gives all the meanings of a word, and the court has, therefore, to select the particular meaning which is relevant to the context in which it has to interpret that word.

……

(16) Being a benefit to arise out of land, any attempt on the part of the State government to tax the amounts payable under the bamboo contract would be not only ultra vires the Orissa Act but also

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unconstitutional as being beyond the State's taxing power under entry 54 in List II in the VII Schedule to the Constitution of India.

(17)The case of Firm Chhotabhai Jethabai Patel & Co. Vs. State of M.P., [1953] SCR 476 is not good law and has been overruled by decisions of larger Benches of this court as pointed out by this Court in State of Madhya Pradesh Vs. Yakinuddin, AIR 1962 SC 1916.

(18) The case of State of Madhya Pradesh Vs. Orient Paper Mills Ltd., (1977) 2 SCC 77 is also not good law as that decision was given per incuriam and laid down principles of interpretation which are wrong in law." (emphasis supplied)

12. In a recent decision in State of H.P. Vs. Gujarat Ambuja Cement Ltd., cited supra, the Supreme Court following its earlier decision in Titaghur Paper Mills' Case (supra) observed as follows:

"50. Though Section 9 refers to 'mineral removal' it does not mean that the royalty is paid on removal. It is point of payability. Royalty in the context of the agreement is an alternate to dead rent. Section 9 speaks of rates of royalty. It is nothing but measure of levy. The charging of dead rent and royalty is under different situations. It is shifting of the measure. Both 'dead rent' and 'royalty' are returns to the lessor. The stand of appellant that under section 9 of the Minerals Act royalty is a payment in respect of any mineral removed or consumed or that royalty is a money consideration for transfer of property is clearly untenable in view of the analysis made above.

51. A mining lease is an interest in immovable property. The extraction and removal of minerals is essentially an extension of the enjoyment of immovable property. As noted in Titaghur Paper Mills' case the right conferred by the lease deed to extract and remove the minerals is a profit a prendre." (emphasis supplied)

13. In the light of the decided cases, it is clear that the minerals extracted by the appellant company from the mines leased to it are a profit a prendre and there is no transaction of purchase or sale in the instant case. Hence, the appeals are partly allowed. The assessment order of the second respondent in so far as it relates to the levy of purchase tax under Section 7-A of the TNGST Act and the proportionate levy of penalty is set aside. So far as the other issues are concerned, the appellant is at liberty to agitate the same in the

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statutory appeal that may be filed under Section 31 of the TNGST Act. If the appeal is preferred within a period of two weeks from the date of receipt of a copy of this order, the appellate authority shall entertain the appeal, subject to statutory compliance, without raising the ground of limitation and decide the same on its own merits. Consequently, M.P.Nos.1+1+1 of 2007 in all the appeals are closed. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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Copy to:-

1. The Secretary,
   Commercial Taxes Department, State of Tamil Nadu,
   Fort St. George,
   Chennai - 600 009.
2. The Commercial Tax Officer,
   Suramangalam Assessment Circle,
   Salem.

+3ccs to Mr.P.Raj Kumar, Advocate Sr 28468
+1cc to Special Govt. Pleader Sr 28521

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km/9.8.

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